



9110-04-P

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

#### **33 CFR Part 165**

**[Docket Number USCG-2019-0725]**

**RIN 1625-AA00**

**Safety Zone; Newtown Creek, New York, NY**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Temporary final rule.

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**SUMMARY:** The Coast Guard is establishing a temporary safety zone for navigable waters within a 300-foot radius of the Kosciuszko Bridge spans crossing Newtown Creek at mile 2.1. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by final stay cable adjustments at each bridge tower anchorage conducted from barges within Newtown Creek. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the U. S. Coast Guard Sector New York Captain of the Port (COTP) or the COTP's designated representative.

**DATES:** This rule is effective without actual notice from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through November 30, 2019. For the purposes of enforcement, actual notice will be used from August 27, 2019 through [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2019-0725 in the “SEARCH” box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Mr. Jeff Yunker, Waterways Management Division, U.S. Coast Guard Sector New York, telephone (718) 354-4195, e-mail [Jeffrey.M.Yunker@uscg.mil](mailto:Jeffrey.M.Yunker@uscg.mil).

**SUPPLEMENTARY INFORMATION:**

**I. Table of Abbreviations**

CFR	Code of Federal Regulations
COTP	Captain of the Port New York
DHS	Department of Homeland Security
FR	<b>Federal Register</b>
LNМ	Local Notice to Mariners
NPRM	Notice of proposed rulemaking
§	Section
U.S.C.	United States Code

**II. Background Information and Regulatory History**

The Coast Guard is issuing this temporary rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because doing so would be impracticable. The late finalization of project details did not give the Coast Guard enough time to publish an NPRM, take public comments, and issue a final rule before the final stay cable adjustments at each bridge tower anchorage is set to begin. It would be impracticable to delay promulgating this rule as it is

necessary to establish this safety zone before the bridge stay cable adjustments begin on, or about, August 27, 2019, to protect the safety of the waterway users, construction crew, and other personnel associated with the bridge replacement project. A delay of the replacement project to accommodate a full notice and comment period would delay necessary operations, result in increased costs, delay the date when the replacement bridge span is expected to be completed and open for normal vehicle traffic on August 28, 2019.

The final stay cable adjustment operations could take place anytime between August 27, 2019 and November 30, 2019. However, we anticipate the installation operations to begin on August 27, 2019. The Coast Guard is publishing this rule to be effective through November 30, 2019 in case the project is delayed due to unforeseen circumstances.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because immediate action is needed to respond to the potential safety hazards associated with final stay cable adjustments conducted from barges in the navigable waters of Newtown Creek prior to the Kosciuszko Bridge westbound span opening for vehicle traffic.

### **III. Legal Authority and Need for Rule**

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034 (previously 33 U.S.C. 1231). The Captain of the Port New York (COTP) has determined that potential hazards associated with final stay cable adjustments starting August 27, 2019, will be a safety concern for anyone within a 300-foot radius of the Kosciuszko Bridge spans at mile 2.1 over Newtown Creek. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the safety zone while the bridge construction is completed.

#### **IV. Discussion of the Rule**

This rule establishes a safety zone from August 27, 2019 through November 30, 2019.

The safety zone will cover all navigable waters within 300 feet of the Kosciuszko Bridge spans at mile 2.1 over Newtown Creek while vessels and machinery are being used by personnel to make final stay cable adjustments at each bridge tower anchorage. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters while the bridge cable stays are being adjusted. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

#### **V. Regulatory Analyses**

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

##### *A. Regulatory Planning and Review*

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. Executive Order 13771 directs agencies to control regulatory costs through a budgeting process. This rule has not been designated a “significant regulatory action,” under Executive Order 12866. Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB), and pursuant to OMB guidance it is exempt from the requirements of Executive Order 13771.

This regulatory action determination is based on the following reasons: 1) The safety zone only impacts a small designated area of Newtown Creek, 2) the safety zone will only be enforced for approximately 30 hours from 5 p.m. on August 27, 2019 through 11 p.m. on August 28, 2019,

instead of the originally requested 48 hours, during the final stay cable adjustments at each bridge tower anchorage on each side of Newtown Creek, or if there is an emergency or other unforeseen circumstance, 3) the contractor has already contacted previously identified upstream users about this waterway closure and received no negative responses. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners via VHF-FM marine channel 16 about the zone, issue a notice in the Local Notice to Mariners, and the rule would allow vessels to seek permission to enter the zone.

#### *B. Impact on Small Entities*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the FOR FURTHER INFORMATION CONTACT section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### *C. Collection of Information*

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### *D. Federalism and Indian Tribal Governments*

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please call or email the person listed in the FOR FURTHER INFORMATION

CONTACT section above.

*E. Unfunded Mandates Reform Act*

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

*F. Environment*

We have analyzed this rule under Department of Homeland Security Directive 023-01 and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969(42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone lasting only 30 hours that will prohibit entry within 300 feet of the Kosciuszko Bridge spans crossing Newtown Creek at mile 2.1 while final stay cable adjustments are being made. It is categorically excluded from further review under paragraph L60(a) in Table 3-1 of U.S. Coast Guard Environmental Planning Implementing Procedures. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under ADDRESSES.

*G. Protest Activities*

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the FOR FURTHER INFORMATION CONTACT section to coordinate protest activities so that your message can be received without jeopardizing the safety

or security of people, places or vessels.

### **List of Subjects in 33 CFR Part 165**

Harbors, Marine safety, Navigation (water) Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

### **PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

1. The authority citation for part 165 continues to read as follows:

**Authority:** 46 U.S.C. 70034, 70051; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

2. Add §165.T01-0725 to read as follows:

#### **§165.T01-0725 Safety Zone, Newtown Creek, New York, NY.**

(a) *Location.* The following area is a safety zone: all waters of Newtown Creek within a 300-foot radius of the Kosciuszko Bridge spans at mile 2.1.

(b) *Definitions.* As used in this section:

*Designated representative* means any Coast Guard commissioned, warrant, petty officer, or designated Patrol Commander of the U.S. Coast Guard who has been designated by the Captain of the Port, Sector New York (COTP), to act on his or her behalf. The designated representative may be on an official patrol vessel or may be on shore and will communicate with vessels via VHF-FM radio or loudhailer. In addition, members of the Coast Guard Auxiliary may be present to inform vessel operators of the regulations in this section.

*Official patrol vessels* means any Coast Guard, Coast Guard Auxiliary, state, or local law enforcement vessels assigned or approved by the COTP to enforce this section.



(c) *Regulations.* (1) The general regulations contained in §§ 165.20 and 165.23 apply.

(2) During periods of enforcement, no person or vessel may enter or remain in the safety zone described in paragraph (a) of this section unless authorized by the Captain of the Port (COTP) or the COTP's designated representative. However, any vessel that is granted permission by the COTP or the COTP's designated representative must proceed through the area with caution and operate at a speed no faster than that speed necessary to maintain a safe course, unless otherwise required by the Navigation Rules.

(3) During periods of enforcement, any vessels transiting must comply with all orders and directions from the COTP or the COTP's designated representative.

(4) Upon being hailed by a Coast Guard vessel by siren, radio, flashing light or other means, the operator of the vessel must proceed as directed by the Coast Guard.

(5) The COTP will promulgate a notice of the channel closure or restrictions by appropriate means to the affected segments of the public. Such means of notification may include, but are not limited to, LNM and/or Broadcast Notice to Mariners.

(d) *Enforcement periods.* (1) This section is effective without actual notice from [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] through November 30, 2019. For the purposes of enforcement, actual notice will be used from August 27, 2019 through [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. This section will only be enforced during the final stay cable adjustments at each bridge tower anchorage.

(2) If enforcement is suspended, the COTP will promulgate a notice of the suspension of enforcement by appropriate means. Such means of notification may include, but are not limited to, Broadcast Notice to Mariners and/or LNM. Such notification will include the approximate date and time enforcement will be suspended as well as the approximate date and time

enforcement will resume.

(3) Violations of the regulations in this section may be reported to the COTP at (718) 354-4353 or on VHF-Channel 16.

Dated: August 21, 2019.

J. P. Tama,

Captain, U.S. Coast Guard,

Captain of the Port New York.

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